RECORD AND BRIEFS

Nos. 15-1358, 15-1359 & 15-1363

IN THE

Supreme Court of the United States

JAMES W. ZIGLAR, *et al.*,
Petitioners,

v.

AHMER IQBAL ABBASI, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ASIAN AMERICANS ADVANCING JUSTICE AND OTHER ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are American-Arab Anti-Discrimination Committee (ADC); Arab American Association of New York (AAANY); Arab-American Institute (AAI); Asian Americans Advancing Justice (AAJC); Asian Pacific American Bar Association of Pennsylvania (APABA-PA); Asian Pacific American Women Lawyers' Alliance (APAWLA); Constitutional Law Center for Muslims in America (CLCMA); Council on American-Islamic Relations (CAIR); Creating Law Enforcement Accountability & Responsibility project (CLEAR); DRUM — Desis Rising Up and Moving; Muslim Advocates; Muslim American Society of Boston (MAS-Boston); Muslim American Society of New York (MAS-NY); Muslim Bar Association of New York (MuBANY); Muslim Consultative Network (MCN); Muslim Justice League; Muslim Legal Fund of America (MLFA); Muslim Public Affairs Council (MPAC); National Asian Pacific American Bar Association (NAPABA); National Association of Muslim Lawyers (NAML); National Coalition to Protect Civil Freedoms (NCPCF); National Network for Arab American Communities (NNAAC); New Jersey Muslim Lawyers Association (NJMLA); Project SALAM (Support and Legal Advocacy for Muslims); Sikh Coalition; South Asian Americans Leading Together (SAALT); South Asian Bar Association Of New York (SABANY); and UNITED SIKHS.

Amici are a coalition of organizations that work with and represent, or partner with, the Arab, Middle Eastern, Muslim, Sikh and South Asian communities in the United States ("AMEMSSA" communities). *Amici* are all concerned with

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than amici curiae, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

the disproportionate law enforcement and immigration measures directed against AMEMSSA communities since the September 11, 2001 attacks, including those at issue in this case—practices animated by gross stereotypes and generalizations that have, in turn, furthered private discrimination against these communities.

This vicious cycle of prejudice has fueled a political climate in which public figures increasingly debate proposals requiring the registration, internment, and exclusion of AMEMSSA community members within and from the United States. This mutually reinforcing pattern of public and private discrimination has seriously harmed members of the communities *amici* serve and represent, and *amici* fear that such stereotyping and stigmatization will only intensify. The availability of judicial remedies is an essential last check on executive overreach where individuals plausibly allege intentional discrimination by government officials.

SUMMARY OF ARGUMENT

The petitioners in these consolidated cases subjected respondents to severe and gross stereotyping. On the basis of their real or apparent religion and national origin, and a broad, impermissible conflation between the threat of terrorism and Muslim and Arab individuals as a whole, the FBI arrested and detained respondents for months. The use of race, religion, national origin, and similar demographic characteristics as proxies for suspicion—as occurred here—was not an isolated or anomalous occurrence. In the last fifteen years, in particular, federal and local governments have repeatedly targeted AMEMSSA communities through a variety of policies and practices. Frequently rooted in generalizations that individuals of an Arab, South Asian, or Muslim appearance or background are likely linked to terrorism, these measures have ranged from prolonged questioning and detention to pervasive surveillance and registration requirements.

Government endorsement of policies rooted in stereotypes linking American Muslims and Arabs with terrorism has given an imprimatur to stereotypes in the private sphere; large numbers of Americans view American Muslims through the lens of such threadbare caricatures. Government programs that rely on these stereotypes, in turn, have contributed to a significant increase in private discrimination against AMEMSSA communities: in the past five years, unfavorable views of Muslims and support for discriminatory measures have intensified. A dangerous feedback loop thus has emerged, where government policies that approach AMEMSSA communities through the lens of suspicion fuel private discrimination, giving rise to public and government institutions increasingly amenable to discriminatory policies and practices. AMEMSSA communities are gravely concerned about this toxic culture of suspicion and stigma through which they are too often viewed and treated.

This case presents the question of whether respondents may seek relief under the remedy authorized in *Bivens v. Six Unknown Named Agents of Federal Bureau Narcotics*, 403 U.S. 388 (1971), for the harms they suffered as a result of government policies and practices that targeted them based on their race, religion, ethnicity, or national origin. Judicial review is a necessary check on executive overreach, and that truism is nowhere more important than here. The judiciary is uniquely capable of stepping in to remedy harms suffered by "discrete and insular" minorities where the other branches of government have failed and where such harms may reinforce private biases. AMEMSSA communities cannot rely on the other branches to alleviate the harms they have faced and continue to face.

Popular sentiment against AMEMSSA communities and congressional reticence to interfere in areas of national security mean that Congress has few incentives to act here. And, as respondents' case highlights, the executive branch has not—and likely will not—rein in its own overreach and

the disproportionate burdens of any national security and immigration policies on AMEMSSA communities. Judicial relief is necessary to prevent federal officials from acting with impunity and to mitigate the baseless suspicion with which AMEMSSA communities are viewed. In a climate of escalating political and public rhetoric demeaning and stereotyping Muslims, it is vital for this Court to affirm that AMEMSSA individuals are entitled to equal protection under the law. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–06 (2015) (rejecting calls for a "cautious approach" when it comes to protecting fundamental rights, especially when faced with a "long history" of public approval of discrimination).

ARGUMENT

I. National Security Policies, Including Those Linked to Immigration, Have Disproportionately and Unfairly Targeted AMEMSSA Communities.

AMEMSSA communities encompass a diverse array of individuals with different backgrounds, nationalities, professions, beliefs, and legal statuses. They include Arab Americans of varying national origins and religions including both Islam and Christianity; non-Arab Middle Eastern peoples from a number of countries including Iran; American Muslims of a variety of races and backgrounds, including a significant number of African Americans and African immigrants; and South Asians of diverse national origins and religious traditions, including adherents of Islam, Hinduism, Buddhism, and Sikhism. *See* Asian Am./Pac. Islanders in Philanthropy, *AMEMSA Fact Sheet* (2011), http://aapip.org/files/incubation/files/amemsa20fact20sheet.pdf; *see also* Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, Pew Research Ctr. (Jan. 6, 2016), http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/ (estimating the American Muslim population at 3.3 million and projecting

that the figure would double by 2050). These groups consist of citizens and non-citizens, individuals born inside and outside of the United States, and many other individualized distinctions too numerous to list.

Despite the diversity across and within these communities, government policy and private prejudice have often consolidated these groups into a single racialized construct. Government and popular responses to the September 11, 2001 attacks consolidated "a new identity category that groups together persons who appear 'Middle Eastern, Arab, or Muslim.' " Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1576 (2002); *see also* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 Calif. L. Rev. 1259, 1278–79 (2004) (describing the emergence of a new racial identity focused on the "the 'Muslim-looking' person," an identity that "capture[d] not only Arab Muslims, but Arab Christians, Muslim non-Arabs (such as Pakistanis or Indonesians), non-Muslim South Asians (Sikhs, Hindus), and even Latinos and African-Americans, depending on how closely they approach[ed] the phenotypic stereotype of the terrorist."). Thus, as with other racialized groups, AMEMSSA communities became identified together as a result of social and political developments, and in spite of distinctions among them.

In the last fifteen years, the federal government has too often lumped together AMEMSSA communities for suspicion and profiling without making individualized determinations or finding a clear connection to terrorism. As in the facts of this very case, individuals from these communities are targeted based on their appearance, perceived identity, and on a generalized stereotype that individuals of an Arab or Muslim background are more likely to be linked to terrorism.

Respondents here include Pakistani Muslims, Egyptian Muslims, an Algerian Muslim, and a Nepalese Buddhist. Br.

In Opp. 9–11. The FBI arrested and detained them based on vague tips from neighbors or based on their appearance or perceived identity. *See id.* (noting that respondents Abbasi, Mehmood, Khalifa, and Bajracharya were investigated in response to vague tips to the FBI regarding "Arabs" or "Arab males"). Respondents had no connection to terrorism or the September 11 attacks. Nonetheless, they were detained for months on end in facilities where they were regularly subjected to physical, verbal, and religious abuse. *Id.* During his detention, for example, respondent Mehmood's hand was broken. Other respondent detainees were slammed into walls, and correctional officers at the facilities subjected them to insults against Arabs and Muslims, among other abuses. *Id.* at 8.

These experiences were by no means an anomaly. Respondents were rounded up and detained as part of a broader investigation purportedly aimed at identifying individuals involved in the September 11 attacks or other acts of terrorism. But reviews of these efforts by the Office of the Inspector General (OIG) later showed that the leads upon which law enforcement officials acted—and the resulting arrests—were often based on generalized stereotypes regarding Arab and Middle Eastern men. *See* J.A. 66–68 (highlighting that leads leading to arrests "were quite general in nature" and often related to Arab or Middle Eastern appearance); *see also id.* at 303 (noting that "the FBI and INS in New York City did little to distinguish the aliens arrested as the subjects of * * * leads or where there was evidence of ties to terrorism from those encountered coincidentally to such leads with no indication of any ties to terrorism").

For example, one of the original plaintiffs in the instant case, Ibrahim Turkmen, first came to the FBI's attention when his landlord reported to the FBI that she "rented her apartment in her home to several Middle Eastern men, and she 'would feel awful if her tenants were involved in terrorism and she didn't call.' " *Turkmen v. Ashcroft*, 789 F.3d

218, 227 n.9 (2d Cir. 2015) (citing Pls.' Compl.). Another man was arrested and classified as a "9/11 detainee" after someone reported that a grocery store was "operated by numerous Middle Eastern men, 24 hours – 7 days a week" and that this was "too many people to run a small store." J.A. 68. Ultimately, these arrests resulted in the government's detention of a total of 762 individuals during the eleven months following September 11, with detainees being subject to various forms of mistreatment at detention facilities. *Id.* at 44–45.

Respondents' experiences collectively constitute a particularly powerful example of AMEMSSA communities being unlawfully profiled by national security policies. Yet they are also illustrative of a broader set of policies and practices that have targeted AMEMSSA communities for the past fifteen years or more. Indeed, AMEMSSA communities are regularly subject to policing and suspicion from federal and local law enforcement in a way that unfairly associates these communities as a whole with the threat of terrorism. *See, e.g.*, Amna Akbar, *Policing "Radicalization"*, 3 U.C. Irvine L. Rev. 809, 854–857 (2013). These policies demonstrate the disproportionate law enforcement attention AMEMSSA communities have received and continue to experience.

For instance, beginning in 2002 and as part of the National Security Entry-Exit Registration System (NSEERS) program, the federal government required the "special registration" of non-citizen males on nonimmigrant visas from Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. *See, e.g.*, 68 Fed. Reg. 2363 (Jan. 16, 2003); 67 Fed. Reg. 77642 (Dec. 18, 2002); 67 Fed. Reg. 70526 (Nov. 22, 2002); 67 Fed. Reg. 67766 (Nov. 6, 2002). All but two of these 25 countries have a majority-Muslim population. *See* Pew Research Ctr., *The Future of the Global Muslim Population*

156–163 (2011), http://www.pewforum.org/2011/01/27/the-future-of-the-global-muslim-population/ (listing North Korea among the nations) (estimating North Korea's Muslim population as less than 0.1 percent of its total population in 2010 and Eritrea's Muslim population at 36.5 percent of its total population in 2010). More than 80,000 males registered in compliance with this program. Am.-Arab Anti-Discrimination Comm., *NSEERS: The Consequences of America's Efforts to Secure Its Borders* 9 (2009), http://www.adc.org/fileadmin/ADC/Pdfs/nseerspaper ("NSEERS White Paper"). Each of those 80,000-plus men were questioned, photographed, and fingerprinted purely on the basis of their nationalities—nationalities apparently chosen because they served as a proxy for Muslim identity.

The NSEERS program did not result in any terrorism-related arrests. *Id.* at 23–24.[2] It did, however, profoundly damage AMEMSSA communities. Many individuals who had registered with NSEERS were placed into immigration removal proceedings based on visa overstays or other irregularities, often where such individuals would not have otherwise been a priority for deportation. *Id.* at 25–26. Indeed, in some neighborhoods, significant portions of the male population were detained or deported. Businesses were shuttered, and many individuals opted to leave the country altogether to avoid being detained or be subjected to an opaque immigration and detention process. Chaleampon Ritthichai, *Special*

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[2] In December 2016, the current presidential administration announced that it would be dismantling the NSEERS program. J. David Goodman & Ron Nixon, *Obama to Dismantle Visitor Registry Before Trump Can Revive It*, N.Y. Times (Dec. 22, 2016), http://www.nytimes.com/2016/12/22/nyregion/obama-to-dismantle-visitor-registry-before-trump-can-revive-it.html. In announcing the end of the program, a spokesman for the Department of Homeland Security (DHS) noted that DHS "had ceased use of [NSEERS] more than five years ago" and that "the program was redundant, inefficient, and provided no increase in security." *Id.*

Registration, Gotham Gazette (Mar. 24, 2003), http://www.gothamgazette.com/open-government/1763-special-registration.

In addition to the NSEERS registration program, and wholly apart from the arrests and detentions made by the FBI following September 11, the FBI for 15 years has questioned thousands of Muslim and Arab male noncitizens based primarily on their country of origin or religion. The agency first targeted citizens of 15 countries and then expanded that list to include 26 countries. U.S. Gen. Accounting Office, *Homeland Security: Justice Department's Project to Interview Aliens After September 11, 2001*, GAO-03-459, 7–8 (2003); *see also* Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 Brook. L. Rev. 41, 47 (2011) [hereinafter Sinnar, *Questioning Law Enforcement*]. These campaigns to question individuals based on their religion or national origin have continued to take place regularly in American Muslim communities across the country. *See* Katie Mettler, *FBI Questioned American Muslims in 8 States Over Weekend About Possible Pre-election Terrorism, Says Civil Rights Group*, Wash. Post (Nov. 7, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/07/fbi-questioned-american-muslims-in-8-states-about-possible-pre-election-terror-says-civil-rights-group/ (describing FBI interviews of American Muslims in eight states prior to the 2016 election in relation to suspicions of terrorism); *see also* Diala Shamas, *Where's the Outrage When the FBI Targets Muslims?*, The Nation (Oct. 31, 2013), https://www.thenation.com/article/wheres-outrage-when-fbi-targets-muslims/ (describing anecdotal evidence of widespread questioning in some communities); Mary Beth Sheridan, *Interviews of Muslims to Broaden*, Wash. Post, July 17, 2004, at A1 (referring to another wave of interviews of American Muslims).

Beyond these registration campaigns and blanket inquiries

directed at American Muslim communities, the FBI has also engaged in suspicionless surveillance of American Muslim communities based on these same crude assumptions. This has included sending informants into religious places without any apparent basis to suspect wrongdoing. In one prominent case, mosque attendees even reported a man's suspicious behavior to the FBI—only to later learn that he was actually an FBI informant tasked with reporting on local Muslims. Jerry Markon, *Tension Grows Between Calif. Muslims, FBI after Informant Infiltrates Mosque,* Wash. Post, (Dec. 5, 2010, 12:47 AM), http://www.washingtonpost.com/wp-dyn/content/article/ 2010/12/04/AR2010120403710.html.

FBI surveillance has also included systematic mapping of AMEMSSA populations. For example, documents obtained through Freedom of Information Act requests show that the FBI collected information on Middle Eastern and Muslim communities in Michigan simply due to the state's large Middle Eastern and Muslim population. Am. Civil Liberties Union, *Unleashed and Unaccountable* 16 (2013), https://www.aclu.org/sites/default/files/assets/unleashed-and-unaccountable-fbi-report.pdf.

The FBI is not the only law enforcement arm that has surveilled AMEMSSA communities wholesale. As revealed by the Associated Press in a series of Pulitzer-Prize-winning reports, the New York City Police Department (NYPD) similarly conducted a secret surveillance program of American Muslim communities in the New York City metropolitan area from at least January 2002 onwards. Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, The Seattle Times (Aug. 25, 2011, 6:16 AM), http://www.seattletimes.com/seattle-news/politics/with-cia-help-nypd-moves-covertly-in-muslim-areas/. Through this long-term program the NYPD monitored Muslim organizations, businesses, students, and individuals in New York and New Jersey. It sent officers into Muslim places of worship, took videos and photos at Muslim-owned locations, and

frequently sought to monitor conversations overheard at mosques. The NYPD did not rely on any modicum of suspicion or wrongdoing for much of this surveillance. Instead, the NYPD targeted 28 "ancestries of interest," all of which were either countries with a large Muslim population or identities such as "American Black Muslim." The NYPD also "mapped" neighborhoods with large immigrant communities, preparing files with titles like "Moroccan Initiative." It further identified Muslim Students' Associations on New York college campuses, sending informants into some of those organizations as well. *See generally* CLEAR, MACLC & AALDEF, *Mapping Muslims: NYPD Spying and its Impact on American Muslims* 39–40 (2013), http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf; *see also Hassan v. City of New York*, 804 F.3d 277, 307 (3d Cir. 2015) (finding that residents of New Jersey subjected to NYPD surveillance stated claims under the First and Fourteenth Amendments); *Raza v. City of New York*, 998 F. Supp. 2d 70, 78–81 (E.D.N.Y. 2013) (discussing the relevance of documents evidencing the existence of the NYPD program to plaintiffs' claims regarding discrimination).

Yet another immigration-related program that has disproportionately impacted AMEMSSA communities is the Controlled Application Review and Resolution Program (CARRP). Instituted by the United States Citizenship and Immigration Services (USCIS) in 2008, the program requires USCIS to screen applications seeking an immigration benefit (i.e. naturalization, lawful permanent resident status, asylum) to ensure that the individual applying does not present a threat to national security. Am. Civil Liberties Union of Southern Cal., *Muslims Need Not Apply: How USCIS Secretary Mandates the Discriminatory Delay and Denial of Citizenship and Immigration Benefits to Aspiring Americans* 15 (2013). The program directs USCIS to place individuals on a "CARPP track" when it first suspects that they present a

"national security concern," subjecting those individuals' applications to further vetting with the aim of "finding a reason to deny [the] application." *Id.*

The American Civil Liberties Union produced an extensive report on CARRP five years after it was instituted, concluding that the program "disproportionately impacted law-abiding immigrants from AMEMS[S]A communities," mislabeling them as "national security concerns," which in turn caused frequent delays and denials of immigration benefit applications. *Id.* at 39. In particular, the report found that because the program directed agents to identify concerns based on indicators such as "national origin" and because of extensive FBI surveillance and data collection on Muslim communities, Muslims were more likely to be treated as "national security concerns" and placed on the CARRP track. *Id.* at 40. As a result of CARRP, individuals who were otherwise eligible for benefits have been subjected to indefinite delays, in one case up to eleven years for a benefit that would normally take six months to receive. *Id.* at 7. This program has ultimately upended lives, as individuals have been forced to postpone the pursuit of economic opportunities, the relocation of their families, and other major life decisions.

At the United States border, AMEMSSA communities are also subjected to additional scrutiny based on national origin. Individuals encountering Customs and Border Patrol (CBP) officers have reported prolonged detention, protracted questioning, and detailed searches of their personal effects that appeared to be related to their Muslim background. Sinnar, *Questioning Law Enforcement*, *supra* at 51–53; *see also id.* at 55 (mentioning instances where travelers with United States citizenship were told they were selected for questioning based on their place of birth). According to recent reports, the FBI and CBP work together to target American Muslims at the border: the FBI provides CBP with a list of countries of origin and other criteria to watch for,

and then approaches passengers at the airport matching those profiles for questioning and recruitment as potential informants. Cora Currier, *Revealed: The FBI's Secret Methods For Recruiting Informants At The Border,* The Intercept (Oct. 5, 2016, 2:52 PM), https://theintercept.com/2016/10/05/fbi-secret-methods-for-recruiting-informants-at-the-border/.

One group of American Muslims described their ordeals at the border in court: despite the fact that they had no criminal records and were not suspected of a crime or terrorism by CBP, they were questioned, fingerprinted, photographed, and detained for four to six hours at the border by CBP officers. *Tabbaa v. Chertoff*, 509 F.3d 89, 94–95 (2d Cir. 2007). Individuals of Muslim or Arab backgrounds have also reported being placed on a "No-Fly List" by the federal government preventing them from traveling overseas by air, despite no notice of whether or why they were placed on such a list. *See Latif v. Holder*, 28 F. Supp. 3d 1134, 1143–46 (D. Or. 2014) (finding that existing procedures for contesting one's placement on the No Fly List were "wholly ineffective" and violated constitutional due process); *see also* Ryan Devereaux, *Class-Action Suit Targets System that Added a Baby to Terrorist Watchlist*, The Intercept (Apr. 6, 2016, 12:25 PM), https://theintercept.com/2016/04/06/class-action-suit-targets-system-that-added-a-baby-to-terrorist-watchlist/ (discussing a similar lawsuit while noting that Dearborn, Michigan—a city with a large Arab American population—had the second highest concentration of individuals on the No Fly List).

This vast national range of policies and practices has demeaned and stigmatized AMEMSSA communities, made them vulnerable to discrimination and afraid that their own government views them with suspicion. *See* Muslim Advocates, *Losing Liberty: The State of Freedom 10 Years after the Patriot Act* 14 (2011), https://www.muslimadvocates.org/ten_years_after_patriot_act_time_to_restore_america_s_freedoms/ ("As a result of [the

FBI's] policies and practices, individuals feel chilled from speaking and worshipping freely because they are afraid that their mosques or other community gatherings and members are under surveillance and that their speech or religious practices may be the basis for government scrutiny."); *see also* Teresa Watanabe & Paloma Esquivel, *L.A. Area Muslims Say FBI Surveillance Has a Chilling Effect on Their Free Speech and Religious Practices*, L.A. Times (Mar. 1, 2009), http://articles.latimes.com/2009/mar/01/local/me-muslim1. These policies and practices have also had a silencing effect *within* AMEMSSA communities. One report observed that as a result of police surveillance programs: individuals became mistrustful of their peers and neighbors; mosques became places of tense watchfulness; and students refrained from expressing their political viewpoints or joining Muslim student groups out of fear of targeting or surveillance. *See* CLEAR, MACLC & AALDEF, *supra* at 5. Public health studies further document the grave personal and emotional consequences of widespread government suspicion. *See, e.g.*, Alyssa E. Rippy & Elana Newman, *Perceived Religious Discrimination and Its Relationship to Anxiety and Paranoia Among Muslim Americans*, 1 J. of Muslim Mental Health 5, 15 (2006) (finding heightened levels of suspicion, vigilance and mistrust among American Muslims, particularly among American Muslim men).

These consequences have only been exacerbated by the increasing incidence of private discrimination against these communities—discrimination reinforced when federal and state officials act with impunity in adopting measures that particularly burden AMEMSSA communities.

II. Government Scrutiny of AMEMSSA Communities Has Contributed to Private Discrimination.

There is often a "mutually reinforcing relationship between individual hate crimes [or prejudice] and governmental racial profiling." Ahmad, *supra* at 1262; *see also* David A. Strauss,

Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 945 (1989) (noting that government "measures that brand a group as inferior or place it in an inferior position certainly encourage [private] prejudice"). And so it is here: by targeting AMEMSSA communities based on generalized stereotypes, and by engaging in the conduct alleged by respondents, federal and local government action has given a similar imprimatur to private biases against these communities.

When government officials rely on stereotypes as proxies for suspicion, it signals to the population at large that such stereotypes are appropriate and permissible. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (noting that government action criminalizing homosexual conduct was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres"). The statements made by, and policies espoused by, prominent political leaders have a particular effect on public opinion; indeed, an analysis of public opinion data by the executive director of the Gallup Center for Muslim Studies concluded that levels of anti-Muslim sentiment in the United States correlated more strongly with domestic political discourse than with external events, even acts of terrorism. *See* Dalia Mogahed, *Islamophobia is Made Up*, Islamic Monthly (Sept. 25, 2013, 9:14 AM), http://theislamicmonthly.com/islamophobia-is-made-up/.

And that anti-Muslim sentiment has been rising substantially since September 11. The public at large frequently perceives American Muslims as having links to terrorism and various segments of the public support restricting American Muslims' rights as a result. In December 2004, a national poll indicated that fully 44 percent of Americans supported some curtailment of civil liberties for American Muslims, 27 percent believed that American Muslims should be required to register their location, and 39 percent believed that American Muslims should be required to carry special identifica-

tion. Blaine Friedlander, *Fear Factor: 44 percent of Americans Queried in Cornell National Poll Favor Curtailing Some Liberties for Muslim Americans*, Cornell Chron. (Dec. 17, 2004), http://news.cornell.edu/print/13782. A TIME magazine poll conducted in 2010 found that nearly one-third of Americans believed that Muslims should be barred from running for the office of President. Alex Altman, *TIME Poll: Majority Oppose Mosque, Many Distrust Muslims*, TIME (Aug. 19, 2010), http://content.time.com/time/nation/article/0,8599,2011799,00.html. One poll found that these views were polarized along the political spectrum and that at least 38 percent of poll respondents had an unfavorable view of Muslims generally. Anna Newby & Elizabeth McElvein, *Poll Shows American Views on Muslims and the Middle East Are Deeply Polarized*, Brookings Institution (July 27, 2016), https://www.brookings.edu/blog/markaz/2016/07/27/poll-shows-american-views-on-muslims-and-the-middle-east-are-deeply-polarized/.

It should go without saying—but apparently must be said—that these widespread notions are utterly misguided. American Muslims are just as likely as other United States faith groups to reject violence. Inst. for Soc. Policy and Understanding, *American Muslim Poll: Participation, Priorities, and Facing Prejudice in the 2016 Elections* 10 (2016), http://www.ispu.org/wp-content/uploads/2016/08/poll2016-1.pdf; *see also* Nicole Naurath, *Most Muslim Americans See No Justification for Violence*, Gallup (Aug. 2, 2011), http://www.gallup.com/poll/148763/muslim-americans-no-justification-violence.aspx ("At least 7 in 10 American adults from all major religious groups agree that [attacks on civilians by individuals or small groups] are never justified, American Muslims are most opposed, with 89% rejecting such attacks"); *see also* Pew Research Ctr., *Little Support for Terrorism Among Muslim Americans*, (2009),

http://www.pewforum.org/2009/12/17/little-support-for-terrorism-among-muslim-americans/. Relatedly, and unsurprisingly, there is a significant gap between how the American public views Muslims, and how American Muslims view themselves. Pew Research Ctr, *Muslim Americans: No Sign of Growth in Alienation or Support for Extremism*, (2011), http://www.people-press.org/2011/08/30/ muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/ ("[W]hile about a quarter of the public (24%) thinks that Muslim support for extremism is increasing, just 4% of Muslims agree.").

These widespread negative perceptions of Muslims have concrete adverse consequences, up to and including violence against members of AMEMSSA communities. In the years immediately following September 11, these communities were subject to a "steady stream of violence." Ahmad, *supra* at 1263.[3] Yet evidence shows that acts of bias, hate violence, and discrimination towards AMEMSSA communities continue to increase and are reaching new, even more disconcerting levels.

At least 50 percent of American Muslim students who took part in a 2012 survey reported experiencing some form of bullying because of their religion. Council on Am.-Islamic Rel. – Cal., *Growing in Faith: California Muslim Youth Experiences with Bullying, Harassment & Religious Accommodation in Schools* 2–3 (2012), http://ca.cair.com/downloads/GrowingInFaith.pdf. Islam-

[3] To illustrate how AMEMSSA communities are frequently conflated, there were numerous reports of violence directed against Hindus, Sikhs and other South Asian individuals following September 11—often with the victims being mistaken as Muslims or Arabs by the perpetrators of these hate crimes. *Id.* at 1262, 1292. Not much has changed since then; many Sikhs still are the target of anti-Muslim hate crimes. *See* Moni Basu, *15 Years After 9/11, Sikhs Still Victims of Anti-Muslim Hate Crimes*, CNN (Sept. 15, 2016, 11:22 AM), http://www.cnn.com/2016/09/15/us/sikh-hate-crime-victims/.

ophobia has also pervaded the workplace; Muslims accounted for one-quarter of the 3,386 religious discrimination claims filed with the EEOC in 2009, despite accounting for less than two percent of the United States population. Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. Times, Sept. 23, 2010, at B1. This discrimination has not spared even the most privileged segments of these communities: in a survey of hundreds of Muslim physicians, fourteen percent report experiencing discrimination, including having patients refuse to be treated by them. Lena H. Sun, *American Muslim Doctors Feel Greater Scrutiny, Even Patients' Suspicions,* Wash. Post (Dec. 11, 2015), https://www.washingtonpost.com/news/to-your-health/wp/2015/12/11/american-muslim-doctors-feel-greater-scrutiny-even-patients-suspicions/?utm_term=.f294a2de2ae9.

More troubling still, an analysis of hate crimes statistics reported by the FBI showed that there were 91 reported aggravated or simple assaults motivated by anti-Muslim bias in 2015— only two shy of the highest reported number of 93 in 2001. Katayoun Kishi, *Anti-Muslim Assaults Reach 9/11-Era Levels, FBI Data Show*, Pew Research Ctr. (Nov. 21, 2016), http://www.pewresearch.org/fact-tank/2016/11/21/anti-muslim-assaults-reach-911-era-levels-fbi-data-show/. In the period leading up to, and following, the 2016 election, acts of violence motivated by animus towards Muslims also spiked. A study examining Islamophobia since the start of the election cycle found that there were more than 53 anti-Muslim attacks in December 2015 alone. Engy Abdelkader, *When Islamophobia Turns Violent: The 2016 U.S. Presidential Elections* 4 (2016), http://bridge.georgetown.edu/wp-content/uploads/2016/05/When-Islamophobia-Turns-Violent.pdf. There were also at least 50 reports of anti-Muslim harassment or intimidation in the week following Election Day. Southern Poverty L. Ctr., *Update: Incidents of Hateful Harassment Since Election Day Now Number 701*,

(Nov. 18, 2016), https://www.splcenter.org/hatewatch/2016/11/18/update-incidents-hateful-harassment-election-day-now-number-701.

The numbers do not fully capture the fear and pain that this intensifying pattern of bias generates for AMEMSSA communities as a whole. Individual incidents of harassment and violence highlight how traumatic these events can be. In August 2012, a gunman entered a Sikh temple outside of Milwaukee, Wisconsin and opened fire on observers at morning prayers, killing six worshippers. *See* Steven Yaccino et al., *Gunman Kills 6 at a Sikh Temple Near Milwaukee*, N.Y. Times, Aug. 5, 2012, at A1 (suspecting that the attack was motivated by Anti-Muslim sentiment and noting that Sikhs are frequently and mistakenly targeted in instances of anti-Muslim violence). In July 2016, a number of attacks against Muslim worshippers outside of mosques occurred across the country, with one man being shot while on his way to prayers in Houston, Texas. *Attacks Underscore Fears that Anti-Muslim Violence on the Rise*, CBS News (July 3, 2016, 9:42 PM), http://www.cbsnews.com/news/houston-florida-mosques-worshipers-shooting-beating/. In September 2016, a mosque in Florida was set on fire by an arsonist who had previously criticized Islam on social media. Eric Lichtblau, *Hate Crimes against American Muslims Most Since Post-9/11 Era*, N.Y. Times, Sept. 17, 2016, at A13. That same month in Brooklyn, New York, an individual attacked two Muslim women and their children, harassing the women and attempting to rip off their hijabs. Lauren del Valle, *2 Muslim Women, Babies Attacked in Alleged Hate Crime in New York*, CNN (Sept. 10, 2016, 12:49 AM), http://www.cnn.com/2016/09/10/us/brooklyn-muslim-women-attacked/index.html. More recently, in November 2016, multiple mosques received letters threatening genocide against Muslims, expressing hope that Muslims would experience "what Hitler did to the Jews." Kristine Guerra, *'It's A Sickness': Letters Calling for Genocide of Muslims*

Sent To Mosques Across The Country, Wash. Post (Nov. 29, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/11/27/trump-will-do-to-you-muslims-what-hitler-did-to-the-jews-mosques-get-threatening-letters/?utm_term=.1ba6b503ecdc.

This rising tide of hate crimes and hate speech directed at AMEMSSA communities is alarming to say the least. Yet, it is, in part, a byproduct of the national security and immigration policies of federal and local authorities, which have normalized and legitimized the profiling and stereotyping of AMEMSSA communities. Without a check on such official action, the public targeting of AMEMSSA communities may continue to feed into existing biases and private discrimination against these groups.

III. In the Absence of Protection from the Political Branches, Judicial Relief from Government Actions Based on Stereotyping Is Important to Forestall Additional Discrimination.

This case presents a prime example of why there is a *Bivens* remedy for government action that targets individuals based on their race, religion, ethnicity, or national origin. In our system of laws, judicial review serves as a check on rogue executive power. The need for judicial review is all the more pressing here, given respondents' well-pled allegations of executive overreach and the systemic public and private discrimination currently facing AMEMSSA communities. Providing a judicial forum for respondents' claims would comport with the long-standing view that the judicial branch plays an important role in protecting "discrete and insular minorities" from prejudice where the other branches of government and the political process have failed to do so. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The Court has recognized that judicial action is imperative where official action would otherwise further stigmatization of minorities and legitimize private discrimi-

nation. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect."). The Court has likewise made clear that it must intervene when state action is based on archaic or overbroad generalizations about group characteristics, lest the Court perpetuate a "self-fulfilling prophecy" that could be further "used to deny rights or opportunities" to that group. *See United States v. Virginia*, 518 U.S. 515, 542–543 (1996).

Petitioners contend that respondents are not entitled to pursue a *Bivens* remedy because the complained-of conduct—described in extensive, well-pled allegations of discriminatory action—occurred in a national security context. But this Court frequently has stepped in to check executive overreach even where executive officials claim that their actions serve national security interests. *See Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Indeed, the *Hamdi* plurality—in a prescient passage—noted that "as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States * * * history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi*, 542 U.S. at 530. Quite so.

Respondents, like most of the hundreds of men and women arrested in the wake of September 11, did not and do not represent national security concerns. They were detained because of generalized, invidious stereotypes linking their appearance to terrorism. This Court has repeatedly invalidated government action rooted in such blatant stereotyping. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("[W]here the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will

prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates.") (citation omitted); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("We may not accept as a defense to racial discrimination the very stereotype the law condemns.").

The only time in the last century that this Court has *upheld* government action rooted in such widespread stereotyping was when it affirmed the race-based internment of Japanese Americans in *Korematsu v. United States*, 323 U.S. 214 (1944). *Korematsu* was not this Court's finest hour; indeed, the decision has been roundly condemned both for endorsing group-based judgments of disloyalty and for deferring categorically to the political branches. *See* Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 391–394 (2011) (noting that four sitting Justices disavowed *Korematsu* as precedential authority in their confirmation hearings). Petitioners would be hard-pressed to show why their asserted national security defense to the classification of individuals based on religion and national origin should be accepted any more than the government's justifications for such conduct 70 years ago.

For institutional reasons, the branch of government charged with protecting national security, the executive branch, is not well-positioned to unilaterally decide questions of law that appear to pit liberty or equality against security interests. *See Hamdi*, 542 U.S. at 545 (Souter, J., concurring in part, concurring in the judgment, and dissenting in part) ("In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular

responsibility is to maintain security."). The importance of the judicial role in defining the outer limits of executive conduct could be no more apparent than it is today. The executive's reluctance to curb the widespread stereotyping resulting in respondents' detention and abuse is—to put it mildly—not likely to change in the immediate future. *See* Press Release, Donald J. Trump, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration ("Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.").

To be sure, the executive branch contains internal accountability mechanisms, including offices of general counsel, Inspectors General, and civil liberties offices. *See, e.g.*, Kathleen Clark, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 B.Y.U. L. Rev. 357, 364–367 (2010); *see also* Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 Harv. C.R.-C.L. L. Rev. 289, 294–298 (2015). But those mechanisms are ultimately beholden to the executive. Presidents may remove Inspectors General without cause, for instance, and national security agencies are statutorily authorized to block Inspector General investigations where they deem the disclosure of information a serious threat to national security. *See* Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 Stan. L. Rev. 1027, 1034–35 (2013) [hereinafter Sinnar, *Protecting Rights*].

Those internal moderating forces also can be manipulated or obstructed, especially with respect to national security. In one noteworthy recent example, the executive branch "used national security secrecy to prevent multiple accountability mechanisms from scrutinizing its warrantless surveillance program," which was later found to have exceeded the

bounds of what information the government could lawfully collect under the Foreign Intelligence Surveillance Act (FISA). Clark, *supra* at 404. More recently still, the Justice Department imposed unprecedented new limits on its Inspector General's ability to access information, impeding investigations into the FBI's counterterrorism powers and threatening to defang Inspectors General across the federal government. *See* Eric Lichtblau, *Tighter Lid on Records Threatens to Weaken Government Watchdogs*, N.Y. Times, Nov. 28, 2015, at A1.

Furthermore, even if internal accountability mechanisms could be rigorous in investigating misconduct, they may not be disposed to recommend the kinds of remedies that courts provide—and in any case, they typically lack the remedial powers to enforce their findings. Sinnar, *Protecting Rights*, *supra* at 1077. This case provides a potent example. The Office of the Inspector General of the United States Department of Justice prepared two rigorous reports—reports that supply the substance of many of the allegations in this case—highlighting the flawed manner in which respondents and others were arrested and detained following September 11. But these reports did not result in accountability for high-level officials, nor in redress from executive agencies or Congress for the individual victims of the government's misconduct. *See id.* at 1043 (observing that the Justice Department "vigorously defended its actions" after the reports were issued and that the Attorney General "asked Congress for an expansion of law enforcement powers just two days after the reports' release"); *id.* at 1067–69.

Nor, for several reasons, is Congress likely to serve as an adequate check on policies affecting AMEMSSA communities.

First, the victims of executive overreach in such instances can often be non-citizens. *See, e.g.*, Br. In Opp. 9–11 (noting respondents were all held in detention based on immigration

charges); *see also* NSEERS White Paper, *supra* at 9 (noting that the NSEERS program required the registration of non-citizens). Such groups are not constituents and cannot vote; Congress consequently has fewer incentives to step in and address their concerns. Second, Congress may be reluctant to protect even citizen-constituents from AMEMSSA communities in light of current public opinion; indeed, as recently as June 14, 2016, fully half of the responders to a Reuters poll agreed with a temporary ban on Muslims from entering the United States. *Agree/Disagree: The United States Should Temporarily Stop All Muslims From Entering the United States*, Reuters, http://polling.reuters.com/#poll/TM923Y16_4/filters/LIKELY:1/dates/20160501-20160614/type/smallest (last accessed Dec. 8, 2016). In light of such widespread public hostility to these communities, there is every good reason to question whether majoritarian institutions will adequately protect the rights of individuals within these groups.

Third, democratic processes are generally less likely to protect minorities when it comes to matters like national security policies, which are frequently adopted in the wake of terrorist incidents or other crises that occasion widespread fear. Legislators in such circumstances "may be more skeptical about pro-liberty than pro-security proposals," particularly where "[e]rror costs on the liberty margin involve harms to discrete, potentially scattered individuals." Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 Cal. L. Rev. 887, 921 (2012). In fact, recent history bears out that Congress has been willing to leave "large discretion in executive hands"; consider, for example, the military commissions used to try suspected terrorists, and the 2008 amendments to FISA. *Id.* at 923.

Neither Congress nor the executive has shown itself to be capable of curbing, or willing to redress, the harms of which respondents complain. The judiciary can, and should.

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AMEMSSA communities have been subject for many years now to disproportionate scrutiny by their government and unjustified animus in daily life—animus that appears to grow by the day, and which is regrettably endorsed at the highest levels. *See* Maggie Haberman & Richard Perez-Pena, *Muslim List? Call by Trump Draws Outrage*, N.Y. Times, Nov. 21, 2015, at A1 (discussing comments proposing a mandatory registry of Muslims in the United States). With such profoundly troubling proposals, and a rising tide of private discrimination and hate violence throughout the country, it is no wonder that AMEMSSA communities are living in fear for their safety and their livelihoods. A remedy for respondents' allegations of intentional discrimination by government officials would provide AMEMSSA communities with some long-awaited solace that their nation's courts will protect their rights, even if the other branches of government fail to do so.

CONCLUSION

For the foregoing reasons and those in the petition, the ruling of the Second Circuit should be affirmed.

Respectfully submitted,

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